



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 13, 2004

Ms. Maleshia B. Farmer  
Assistant City Attorney  
City of Fort Worth  
1000 Throckmorton Street  
Fort Worth, Texas 76102

OR2004-2993

Dear Ms. Farmer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199283.

The City of Fort Worth (the "city") received a request for 43 categories of information relating to a named deceased individual. You inform us the city will release some of the requested information. You claim that the rest of the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and have reviewed the information you submitted.

We first note that some of the submitted information is subject to section 552.022 of the Government Code. This section provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

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<sup>1</sup>Although you also initially raised sections 552.107, 552.108, and 552.111, you have submitted no arguments in support of those exceptions. Consequently, we do not consider the applicability of sections 552.107, 552.108, or 552.111 to any of the submitted information. See Gov't Code §§ 552.301(e)(1)(A), .302.

Gov't Code § 552.022(a)(1). In this instance, the submitted information includes completed reports made of, for, or by a governmental body. The city must release these reports under section 552.022(a)(1) unless they contain information that is excepted from disclosure under section 552.108 or expressly confidential under other law. You do not seek to withhold any of the submitted information under section 552.108. Rather, you claim that this information is excepted from disclosure under section 552.103. We note, however, that section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 subject to waiver). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Thus, the city may not withhold any of the information that is subject to section 552.022 under section 552.103.

We note, however, that section 552.101 of the Government Code is applicable to some of the information that is subject to section 552.022. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses statutory confidentiality provisions. Article 49.18(b) of the Code of Criminal Procedure is applicable to custodial death reports. In Open Records Decision No. 521 (1989), this office addressed the confidentiality of custodial death reports and their attachments. We concluded that under article 49.18(b) of the Code of Criminal Procedure, in conjunction with a directive issued by the Office of the Attorney General, Part I of a custodial death report filed with this office is public information, but Parts II through V of the report, including any attachments, are confidential. *See* Open Records Decision No. 521 at 4-5; *see also* Crim. Proc. Code art. 49.18(b) (attorney general shall make report, with exception of any portion of report that attorney general determines is privileged, available to any interested person). Article 49.18(b) requires that a custodial death report must be filed "with the attorney general no later than the 30th day after the date on which the person in custody or the incarcerated person died." *Id.* In this instance, more than thirty days elapsed between the death of the individual to whom the custodial death report relates and the city's receipt of this request for information. Therefore, the city must release Part I of the submitted custodial death report as information that is made public by statute. *See* Open Records Decision No. 525 (1989) (exceptions found in statutory predecessor to Public Information Act (the "Act"), chapter 552 of Government Code, not applicable to information made public by other statutes). The rest of the report, including any attachments, is confidential and must be withheld from disclosure under section 552.101.

Section 552.101 also encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976),

*cert. denied*, 430 U.S. 931 (1977). This office has determined that financial information relating only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision Nos. 545 at 4 (1990) (“In general, we have found the kinds of financial information not excepted from public disclosure by common-law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities”), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public’s interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). We note, however, that the common-law right to privacy is a personal right that lapses at death, and therefore common-law privacy does not encompass information that relates only to a deceased individual. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref’d n.r.e.); Open Records Decision No. 272 at 1 (1981). The documents that are subject to section 552.022 contain personal financial information that is protected by common-law privacy. The city must withhold that information, which we have marked, under section 552.101.

The documents that are subject to section 552.022 also contain motor vehicle information. Section 552.130 excepts from public disclosure information that relates to “a motor vehicle title or registration issued by an agency of this state[.]” Gov’t Code § 552.130(a)(2). We have marked Texas license plate numbers, vehicle identification numbers, and other Texas motor vehicle title and registration information in the documents that are subject to section 552.022. Because section 552.130 protects privacy interests, this section is not applicable to information that relates to a motor vehicle in which no living individual has an ownership interest. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref’d n.r.e.); Open Records Decision No. 272 at 1 (1981). However, to the extent that the information that we have marked relates to motor vehicles in which living individuals have interests, the city must withhold the marked information under section 552.130.

Next, we address your claim under section 552.103 with regard to the information that is not subject to section 552.022. Section 552.103 provides in part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* In *Open Records Decision No. 638 (1996)*, this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when the governmental body (1) has received a notice of claim letter and (2) represents that the notice is in compliance with the notice requirements of the Texas Tort Claims Act (the “TTCA”), chapter 101 of the Civil Practice and Remedies Code, or an applicable municipal ordinance. *See Open Records Decision No. 638 at 4 (1996).*

You inform us that the city believes the submitted letter from the requestor to be in compliance with the notice requirements of the TTCA. You also assert that the requested information relates to the anticipated litigation. Based on your representations, we find that litigation was reasonably anticipated on the date of the city's receipt of this request for information. We also find that the information that is not subject to section 552.022 relates to the anticipated litigation. We therefore conclude that the information that is not subject to section 552.022 is excepted from disclosure at this time under section 552.103.

In reaching this conclusion, we assume that the opposing party in the anticipated litigation has not seen or had access to any of the information that is not subject to section 552.022. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See Open Records Decision No. 551 at 4-5 (1990).* If the opposing party has seen or had access to information that relates to anticipated litigation, through discovery or otherwise, then there is no interest in withholding that information from public

disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary: (1) the city must withhold the confidential portions of the custodial death report under section 552.101 in conjunction with article 49.18 of the Code of Criminal Procedure; (2) the city must withhold the marked personal financial information that is protected by common-law privacy under section 552.101 of the Government Code; (3) the marked Texas motor vehicle information that relates to motor vehicles in which living individuals have interests must be withheld under section 552.130; and (4) the city may withhold the information that is not subject to section 552.022 under section 552.103, to the extent that the opposing party has not seen or had access to that information. The rest of the submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

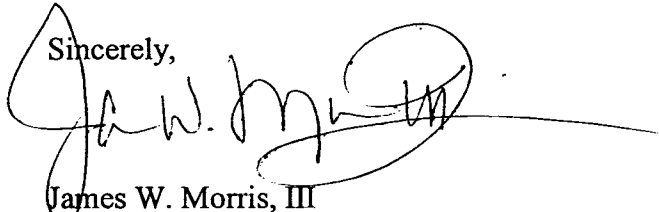
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a long horizontal flourish extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 199283

Enc: Submitted documents

c: Mr. Darrell L. Keith  
Keith Law Firm, P.C.  
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Fort Worth, Texas 76102  
(w/o enclosures)